**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

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| TESSA G.,<br><br>Plaintiff,<br>v.<br><br>XAVIER BECERRA, *Secretary, United States Department of Health and Human Services*,<br><br>Defendant. | CIVIL ACTION FILE NO.<br>1:23-cv-02665-LMM-RGV |

**MAGISTRATE JUDGE'S NON-FINAL**
**REPORT, RECOMMENDATION, AND ORDER**

On June 14, 2023, plaintiff, using the alias "Tessa G." and proceeding *pro se*, filed this action against defendant Xavier Becerra ("Becerra"), in his official capacity as Secretary of the United States Department of Health and Human Services (the "Agency"), alleging claims of discriminatory discharge, failure to accommodate, retaliation, and illegal disclosure pursuant to the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. ("Rehabilitation Act"), and deprivation of due process in violation of the Fifth Amendment. [Doc. 1].[1] On the same day, plaintiff moved to file her complaint and associated pleadings and submissions using the alias "Tessa G.," which was

[1] The listed document and page numbers in citations to the record refer to the document and page numbers shown on the Adobe file reader linked to the Court's electronic filing database, CM/ECF.

assigned by the Equal Employment Opportunity Commission ("EEOC") during the administrative processing of her complaint, [Doc. 2], but the Court denied her motion on August 17, 2023, [Doc. 4].[2] Becerra filed a motion to dismiss the complaint on December 22, 2023, [Doc. 10], and on January 31, 2024, after obtaining an extension of time to respond, see [Doc. 13], plaintiff filed a response in opposition to the motion to dismiss, [Doc. 14], and her first amended complaint, [Doc. 15]. Becerra has since filed a motion to dismiss the amended complaint, [Doc. 16], which plaintiff opposes,

[2] Plaintiff filed objections to the Order denying her motion to proceed anonymously using her alias assigned by the EEOC. [Doc. 5]. The Honorable Leigh M. May, United States District Judge for the Northern District of Georgia, subsequently entered an Order, [Doc. 26], overruling plaintiff's objections, and "direct[ing her] to comply with the Magistrate Judge's Order[,] [Doc. 4]," [id. at 6]. On May 23, 2024, plaintiff appealed the Order to the Eleventh Circuit Court of Appeals. [Doc. 27]. Generally, the "filing of a notice of appeal [] divests a district court of jurisdiction as to those issues involved in the appeal." U.S. Commodity Futures Trading Comm'n v. Escobio, 946 F.3d 1242, 1251 (11th Cir. 2020) (per curiam) (citations omitted); see also Johnson v. 3M Co., 55 F.4th 1304, 1309 (11th Cir. 2022) (quoting Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982)). However, "an interlocutory appeal does not completely divest the district court of jurisdiction," as "[t]he district court has authority to proceed forward with portions of the case not related to the claims on appeal." Johnson, 55 F.4th at 1309 (citations and internal marks omitted); see also In re Roberts, 291 F. App'x 296, 298 (11th Cir. 2008) (per curiam) (unpublished) (alteration, citation, and internal marks omitted) (stating that the general rule "does not prevent the district court from entertaining motions on matters collateral to those at issue on appeal"). Although the appeal of the Order on her motion to proceed anonymously is pending, the District Court "has not been divested of jurisdiction because the motion[s] to dismiss involve[] matters not involved in the appeal." Doe v. Sheely, CIVIL ACTION FILE NO. 3:18-cv-122-TCB, 2019 WL 11505838, at *1 n.1 (N.D. Ga. Aug. 15, 2019) (citing Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 378-79 (1985)), aff'd, 855 F. App'x 497 (11th Cir. 2021) (per curiam) (unpublished)).

[Doc. 22], and Becerra has filed a reply in support of his motion, [Doc. 24]. Becerra has also filed a motion for leave to file matters under seal relating to his motions to dismiss, [Doc. 17], to which plaintiff has not responded. For the reasons that follow, Becerra's motion for leave to file matters under seal, [Doc. 17], is **GRANTED**, and it is **RECOMMENDED** that Becerra's motion to dismiss the amended complaint, [Doc. 16], be **GRANTED IN PART** and **DENIED IN PART**, and that Becerra's motion to dismiss the original complaint, [Doc. 10], be **DENIED** as **MOOT**.

## I. FACTUAL AND PROCEDURAL BACKGROUND

### A. Preliminary Matters

#### 1. *Consideration of Exhibits*

Before addressing the pending motions to dismiss, the Court must determine whether it may properly consider certain exhibits offered by the parties. Generally, the Court "may not consider matters outside the pleadings without converting [a motion to dismiss] to a motion for summary judgment[.]" Redding v. Tuggle, No. 1:05-cv-2899-WSD, 2006 WL 2166726, at *5 (N.D. Ga. July 31, 2006), adopted at *1; see also Omega Patents, LLC v. Lear Corp., No. 6:07-cv-1422-Orl-31DAB, 2008 WL 821886, at *1 (M.D. Fla. Mar. 20, 2008). However, the Court may consider an exhibit without converting the motion into a motion for summary judgment if it is "central to the plaintiff's claim[s] and the authenticity of the document is not challenged." Adamson v. Poorter, No. 06-15941, 2007 WL 2900576, at *2 (11th Cir. 2007) (per

curiam) (unpublished) (citing Horsley v. Feldt, 304 F.3d 1125, 1134 (11th Cir. 2002); Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1369 (11th Cir. 1997) (per curiam)); see also Edmonds v. Southwire Co., 58 F. Supp. 3d 1347, 1352 (N.D. Ga. 2014) (citation omitted); Atwater v. Nat'l Football League Players Ass'n, Civil Action No. 1:06-CV-1510-JEC, 2007 WL 1020848, at *3 (N.D. Ga. Mar. 29, 2007); Cobb v. Marshall, 481 F. Supp. 2d 1248, 1254 n.2 (M.D. Ala. 2007) (citations omitted). Additionally, the Court "may take judicial notice of matters of public record without converting a Rule 12(b)(6) motion into a Rule 56 motion." Halmos v. Bomardier Aerospace Corp., 404 F. App'x 376, 377 (11th Cir. 2010) (per curiam) (unpublished) (citations omitted).

Becerra attached to both his motions to dismiss documents related to the proceedings before the EEOC, including decisions issued by the EEOC on June 8, 2020, August 29, 2022, and March 16, 2023, in addition to a Report and Recommendation issued in this Court on December 22, 2004. See [Docs. 10-2, 10-4, 11-1, 11-2, 16-3, 16-5, 16-6, & 16-7]. Plaintiff also attached certain documents related to the proceedings before the EEOC to her responses in opposition to Becerra's motions to dismiss. See [Doc. 14 at 40-58; Doc. 22-2; Doc. 22-4]. Each of these exhibits are matters of public record of which the Court may take judicial notice without converting the motions to dismiss to motions for summary judgment. See Halmos, 404 F. App'x at 377 (citations omitted); see also Ellison v. Postmaster Gen., U.S. Postal

Serv., No. 20-13112, 2022 WL 4726121, at *6 (11th Cir. Oct. 3, 2022) (per curiam) (citations omitted) (stating that "a district court, at the motion to dismiss stage, may take judicial notice of relevant public documents"); Isaac v. Argos U.S.A. LLC, CIVIL ACTION FILE NO. 1:18-cv-05242-WMR-LTW, 2019 WL 13276691, at *5 (N.D. Ga. Aug. 19, 2019) (citations omitted) ("Courts in the Eleventh Circuit regularly consider EEOC documents attached to a motion to dismiss in employment discrimination cases either because they are central and undisputed or under the public records exception."), adopted by 2019 WL 13276603, at *1 (N.D. Ga. Sept. 9, 2019); Chapman v. Wilkie, CV 318-014, 2018 WL 4903264, at *1 (S.D. Ga. Oct. 9, 2018) (considering the decision of the EEOC at the motion to dismiss stage).

Becerra also attached to his second motion to dismiss excerpts from the Report of Investigation ("ROI"), see [Doc. 16-2], which includes plaintiff's Equal Employment Opportunity ("EEO") complaint with the Agency, [id. at 15-20], and plaintiff attached additional ROI excerpts to her response to the first motion to dismiss, see [Doc. 14 at 32-39]. The Court will consider certain portions of the ROI excerpts, including plaintiff's EEO complaint, [Doc. 16-2 at 15-20], the investigative summary, [id. at 3-11], and a letter partially accepting her complaint of discrimination, [id. at 28-31], without converting the motions to dismiss to motions for summary judgment since the exhibits are "central to [ plaintiff's] claim[s] and the authenticity of the document[s are] not challenged," Adamson, 2007 WL 2900576, at

*2 (citations omitted); see also Bruce v. U.S. Bank Nat'l Ass'n, 770 F. App'x 960, 964 (11th Cir. 2019) (per curiam) (unpublished) (citation and internal marks omitted) ("[W]here the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the Court may consider the documents part of the pleadings for purposes of Rule 12(b)(6) dismissal."); Rogers v. Wilkie, NO. 3:18-CV-00846-ALB-WC, 2019 WL 6698139, at *4 n.1 (M.D. Ala. Dec. 6, 2019) (citation omitted) (considering the plaintiff's EEO complaint as part of the pleadings for purposes of the motion to dismiss where the EEO complaint was referenced in her complaint and was central to her claims); Hodge v. Orlando Utils. Comm'n, No. 6:09–cv–1059–Orl–19DAB, 2009 WL 5067758, at *4 (M.D. Fla. Dec. 15, 2009) (citation and internal marks omitted) (stating that it was clear to the court that it could consider the letter from the EEOC summarizing its investigation "either as [an] undisputed document[] referenced in the complaint or central to the plaintiff's claim, or as information which is a matter of public record, without converting [the] motion to one [for] summary judgment"). Further, "it is not error for a court to consider evidence outside of the pleadings when a motion to dismiss is based on exhaustion of administrative remedies." Moh v. City of Atlanta, Civil Action File No. 1:10–CV–04058–TWT–AJB, 2011 WL 2579829, at *4 n.3 (N.D. Ga. May 20, 2011) (citing Tillery v. U.S. Dep't of Homeland Sec., 402 F. App'x 421, 425 (11th Cir. 2010) (per curiam) (unpublished)), adopted by 2011 WL 2565681, at *1 (N.D. Ga. June 28,

2011).[3] Thus, to the extent necessary to resolve Becerra's motions to dismiss, the Court will consider these exhibits without converting the motions to motions for summary judgment.

**2.** ***Motion to File Under Seal, [Doc. 17]***

On February 16, 2014, Becerra filed a motion for leave to file matters under seal relating to his motions to dismiss. [Doc. 17]; see also [Docs. 10 & 16]. Plaintiff did not file a response to the motion for leave to file matters under seal, and accordingly the motion is deemed unopposed. See LR 7.1(B), NDGa. Having considered the motion for leave to file matters under seal, [Doc. 17], and the provisionally sealed exhibits, [Docs. 10-2, 10-3, 10-4, 11-1, 11-2, & 16-2], the Court finds good cause for sealing these exhibits, and the motion, [Doc. 17], is therefore **GRANTED**. Accordingly, the Clerk is **DIRECTED** to maintain **UNDER SEAL** the exhibits identified in Becerra's motion, [Docs. 10-2, 10-3, 10-4, 11-1, 11-2, & 16-2].

**3.** ***Motion to Dismiss, [Doc. 10]***

Becerra filed a motion to dismiss plaintiff's original complaint on December 22, 2023. [Doc. 10]. On January 31, 2024, after obtaining an extension of time to respond to Becerra's motion to dismiss, see [Doc. 13], plaintiff filed an amended

[3] The Court has not considered the remaining documents offered by the parties, see [Docs. 10-3, 16-4, & 22-3], since they are not referenced in the amended complaint or central to plaintiff's claims, Adamson, 2007 WL 2900576, at *2 (citations omitted).

complaint against Becerra, [Doc. 15], and Becerra has filed a motion to dismiss the amended complaint, [Doc. 16]. For the reasons that follow, it is **RECOMMENDED** that Becerra's motion to dismiss plaintiff's original complaint, [Doc. 10], be **DENIED** as **MOOT**.

Under Rule 15(a)(1) of the Federal Rules of Civil Procedure, a party may amend its pleading once as a matter of course within 21 days after service of a motion under Rule 12(b). Fed. R. Civ. P. 15(a)(1)(B). "An amended pleading supersedes the former pleading" such that "'the original pleading is abandoned by the amendment, and is no longer a part of the pleader's averments against [her] adversary.'" Dresdner Bank AG v. M/V Olympia Voyager, 463 F.3d 1210, 1215 (11th Cir. 2006) (footnote and citation omitted); see also Fritz v. Standard Sec. Life Ins. Co., 676 F.2d 1356, 1358 (11th Cir. 1982) (citations omitted) ("Under the Federal Rules, an amended complaint supersedes the original complaint.").

The amended complaint, [Doc. 15], supersedes the original complaint, [Doc. 1], because it was "timely filed . . . within the extended period for filing a response to [Becerra's] motion to dismiss granted by the Court," Thornton v. Equifax Info. Servs., LLC, CV 5:23-098, 2024 WL 779256, at *1 (S.D. Ga. Feb. 26, 2024) (citation omitted) (citing Fed. R. Civ. P. 15(a)(1)); see also [Doc. 13], and the original complaint is no longer the operative pleading before the Court, see Locascio v. BBDO Atlanta, Inc., 56 F. Supp. 3d 1356, 1359 n.2 (N.D. Ga. 2014) (citations omitted), adopted at 1358.

Thus, Becerra's motion to dismiss the original complaint, [Doc. 10], has been rendered moot because this motion pertains to the original complaint, which is no longer the operative pleading in this case, see Paulo v. OneWest Bank, FSB, No. 1:13–cv–3695–WSD, 2014 WL 3557703, at *7 (N.D. Ga. July 18, 2014) (citation omitted) (denying defendant's motion to dismiss the original complaint as moot because plaintiff's amended complaint "replace[d] the original complaint and [was] the 'operative pleading' in the case"), adopted at *6; Hall v. Deutsche Bank Nat'l Tr. Co., CIVIL ACTION FILE NO. 1:11-CV-02524-AT-AJB, 2012 WL 13009212, at *2 (N.D. Ga. Feb. 17, 2012) (citations omitted) ("[T]he amended complaint renders moot the motion to dismiss because that motion seeks to dismiss a pleading that has been superseded."); Bradley v. DeKalb Cnty., Civil Action File No. 1:10–CV–0218–TWT–GGB, 2010 WL 4639240, at *2 (N.D. Ga. May 17, 2010) ("Defendants' first motion to dismiss has been rendered moot by the filing of [p]laintiff's [a]mended [c]omplaint."), adopted by 2010 WL 4638887, at *1 (N.D. Ga. Nov. 4, 2010). Accordingly, it is **RECOMMENDED** that Becerra's motion to dismiss plaintiff's original complaint, [Doc. 10], be **DENIED** as **MOOT**, but Becerra's motion to dismiss the first amended complaint, [Doc. 16], remains pending and will now be addressed.

**B. Statement of Facts**

In March 2013, plaintiff applied for a fellowship position at the Oak Ridge Institute for Science and Education ("ORISE"), part of the Agency's Public Health

Law Program ("PHLP") in the Center for Disease Control and Prevention's ("CDC") Office of State Tribal Local and Territorial Support. [Doc. 15 ¶¶ 55, 59].[4] She was interviewed by Matthew Penn ("Penn"), the PHLP Director, and other staff members of the Agency shortly after she applied for the position, and Penn offered her a position as an ORISE Fellow on April 18, 2013, for a duration of four months. [Id. ¶¶ 56-57, 59]. Plaintiff asserts that although she accepted the offer in April 2013, it was not until May 28, 2013, after she relocated to Atlanta, Georgia, and secured housing, that she "received the very first communication from ORISE via email[] confirming her 'ORISE Fellowship' at the Agency[] and her monthly pay and health insurance." [Id. ¶¶ 61, 67, 69-70, 72]. Plaintiff began her employment on June 2, 2013, and her position was subsequently extended for eight months. [Id. ¶¶ 71, 92].

In early 2014, plaintiff transitioned from working on her first assigned project to developing her second project, an assessment for the CDC's Division of Adolescent and School Health ("DASH"). [Id. ¶¶ 68, 93]. According to plaintiff, "Penn as well as other managers [of the] Agency[] reviewed, and expressed their approval of, [her] progress on her initial development of the DASH project" in April 2014, [id. ¶ 94], and she was offered an additional contract extension of one year, [id. ¶¶ 95-96]. Several days after her employment was extended, plaintiff "disclosed her

[4] The factual background is taken from the pleadings and exhibits and does not constitute findings of fact by the Court.

epilepsy to [] Penn" after she suffered a seizure that involved a loss of consciousness, and she "request[ed] brief medical leave effective early June 2014 to receive follow-up testing and treatment for her epilepsy," which was granted by Penn without a request by Penn "for any supporting documentation of her disability and/or medical condition(s)." [Id. ¶¶ 97-99].[5] Plaintiff asserts that "[t]hereafter, [m]ultiple managers and staff in the Agency discussed [her] epilepsy on several occasions amongst themselves[] and made comments to [p]laintiff regarding their concern about [her] epilepsy and the effect it would potentially have on [her] performance." [Id. ¶ 103].

While plaintiff was on medical leave in June 2014, the Agency hired another person to work on the DASH project, and plaintiff was informed of the decision when she returned from leave. [Id. ¶¶ 106-07]. Plaintiff was subsequently abruptly removed from the DASH project by Penn on September 11, 2014, "without prior notice," and "despite [] Penn not giving [p]laintiff any negative feedback at all for over a year[.]" [Id. ¶¶ 125-26]. After Penn allegedly "emailed several staff throughout the PHLP to solicit negative feedback regarding [p]laintiff," and "several weeks after she was removed from the DASH project and marginalized," Penn "emailed [p]laintiff her first and only, and negative, performance review[.]" [Id. ¶¶

[5] Plaintiff contends that "[a]t the same meeting, after disclosing her disability status and asking for medical leave, [she] asked [] Penn to evaluate her performance so [she] could gauge her strengths and weaknesses and better perform in her role," but "Penn refused to offer such a review or feedback." [Id. ¶ 102].

130, 133]. According to plaintiff, the performance review "contained numerous general yet pervasive alleged performance problems that had never been raised before[,] and moreover consisted in significant part of criticizing [p]laintiff's 'neurodivergent' characteristics more common among people with disabilities such as [p]laintiff's," and "[n]either the [r]eview nor [the] email to which the [r]eview was attached mentioned anything about developing a performance improvement plan, or even any opportunity for[] performance improvement on [p]laintiff's part." [Id. ¶¶ 134, 137]. Plaintiff met with Penn on October 1, 2014, the day after he issued the negative performance review, and although he "refused to cite any further details . . . or tell [ plaintiff] what performance expectations she would be expected to meet going forward," [id. ¶ 138], on October 6, 2014, Penn told plaintiff "that it would 'probably be helpful' to develop a 'professional development plan,'" [id. ¶ 139].

After canceling a meeting with plaintiff on October 7, 2014, Penn "emailed [p]laintiff to [reschedule] the meeting to discuss 'professional development' for October 14, and requested that [p]laintiff formulate and send him a draft 'professional development' plan before the meeting[.]" [Id. ¶¶ 140-41]. Because plaintiff had previously requested and been approved to take leave from October 8 through October 19, 2014, plaintiff asked to postpone the meeting until her return from leave. [Id. ¶¶ 143-44]. However, on October 23, 2014, "three days after [p]laintiff returned from brief leave, . . . Penn emailed ORISE and demanded that

[p]laintiff be terminated." [Id. ¶ 148]. On November 7, 2014, while "out a few days due to illness, [p]laintiff received a letter from ORISE via email informing her [that] her 'fellowship' position had been terminated effective two days prior, on November 5." [Id. ¶ 154]. According to plaintiff, "ORISE provided no reason at all [in the letter] for her termination," and plaintiff "was given no prior notice, nor any form of hearing or due process, prior to her termination." [Id. ¶¶ 155-56].

Plaintiff "commenced the EEO process with [the] Agency . . . on November 21, 2014," [id. ¶ 157], and she filed her formal complaint of discrimination with the Agency's EEO office on February 10, 2015, asserting disability discrimination and retaliation, see [Doc. 16-2 at 15-20]. Specifically, she asserted that her "supervisor, [] Penn, initiated two discriminatory and retaliatory adverse actions against [her] based on [her] disability status: 1) On September 11, 2014, [] Penn demoted [her] from [her] project manager role; and 2) [] Penn orchestrated [her] termination that occurred on November 6, 2014." [Id. at 17]. Plaintiff's formal EEO complaint was partially accepted by letter dated May 5, 2015, [id. at 28-31], and the Agency conducted an investigation from May 7 through September 10, 2015, and issued a ROI, see [Doc. 16-2]. According to plaintiff, "[f]ollowing protracted administrative proceedings and noncompliance by the Agency[], an Administrative [Law] Judge [('ALJ')] issued a default judgment on [p]laintiff's part," holding that the Agency "discriminated against [ p]laintiff when it terminated her[.]" [Doc. 15 ¶¶ 36-37]. After the ALJ

"denied most equitable relief and compensatory damages," plaintiff appealed the ALJ's decision to the EEOC's Office of Federal Operations ("OFO") on August 17, 2020. [Id. ¶ 47]; see also [Doc. 16-3 at 1]. The OFO issued a decision on August 29, 2022, "slightly increas[ing] its award of compensatory damages," while upholding "the denial of the majority of equitable relief" and remanding "a portion of the [c]omplaint back to the [ALJ] to determine [p]laintiff's entitlement to pecuniary damages." [Doc. 15 ¶¶ 48-49]; see also [Doc. 16-3].

Plaintiff requested reconsideration by the OFO on two occasions, both of which were denied. [Doc. 15 ¶¶ 50, 52-53]. Plaintiff filed suit in this Court on June 14, 2023, [Doc. 1], and after Becerra moved to dismiss the original complaint, [Doc. 10], plaintiff filed an amended complaint on January 31, 2024, [Doc. 15], in which she asserts claims for discriminatory discharge, failure to accommodate, retaliation, and illegal disclosure in violation of the Rehabilitation Act, and deprivation of due process in violation of the Fifth Amendment and § 702 of the Administrative Procedure Act ("APA"), [id. ¶¶ 188-245]. Becerra moved to dismiss the amended complaint on February 14, 2024, [Doc. 16], which plaintiff opposes, [Doc. 22]. Becerra has filed a reply in support of his motion to dismiss the amended complaint, [Doc. 24], which is now ripe for ruling.

## II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of an action when the complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss, the Court must accept plaintiff's allegations as true and construe the complaint in her favor. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Duke v. Cleland, 5 F.3d 1399, 1402 (11th Cir. 1993); Tapsoba v. Khiani Alpharetta, LLC, Civil Action No. 1:13–CV–1519–RWS, 2013 WL 4855255, at *1 (N.D. Ga. Sept. 11, 2013).[6] "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, [] plaintiff's obligation to provide the grounds of [her] entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action

[6] "However, the court need not 'accept as true a legal conclusion couched as a factual allegation.'" Smith v. Delta Air Lines, Inc., 422 F. Supp. 2d 1310, 1324 (N.D. Ga. 2006) (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986)). "Additionally, '[c]onclusory allegations and unwarranted deductions of fact are not admitted as true, especially when such conclusions are contradicted by facts disclosed by a document appended to the complaint. If the appended document . . . reveals facts which foreclose recovery as a matter of law, dismissal is appropriate.'" Id. (alteration in original) (footnote omitted) (quoting Associated Builders, Inc. v. Ala. Power Co., 505 F.2d 97, 100 (5th Cir. 1974)). Decisions of the Fifth Circuit rendered before October 1, 1981, are binding precedent in the Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (last alteration in original) (citations and internal marks omitted).

"Factual allegations must be enough to raise a right to relief above the speculative level," id. (footnote and citation omitted), as the complaint must contain "enough facts to state a claim to relief that is plausible on its face," id. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Twombly, 550 U.S. at 556). The Supreme Court in Iqbal held:

> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief."

Id. at 678-79 (last alteration in original) (citations omitted); see also Evans v. Ga. Dep't of Behav. Health & Developmental Disabilities, CV 415-103, 2018 WL 4610630, at *3 (S.D. Ga. Sept. 25, 2018) (alterations in original) (citation and internal marks omitted)

("Although there is no probability requirement at the pleading stage, something beyond . . . mere possibility . . . must be alleged.").

"While Rule 12(b)(6) does not permit dismissal of a well-pleaded complaint simply because 'it strikes a savvy judge that actual proof of those facts is improbable,'" Watts v. Fla. Int'l Univ., 495 F.3d 1289, 1295 (11th Cir. 2007) (quoting Twombly, 550 U.S. at 556), "[t]o state a plausible claim for relief, a plaintiff must go beyond merely pleading the 'sheer possibility' of unlawful activity by [] defendant and so must offer 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,'" Stabb v. GMAC Mortg., LLC, 579 F. App'x 706, 708 (11th Cir. 2014) (per curiam) (unpublished) (citation omitted). "Regardless of the alleged facts, however, a court may dismiss a complaint on a dispositive issue of law." Moore v. McCalla Raymer, LLC, 916 F. Supp. 2d 1332, 1342 (N.D. Ga. 2013) (citations and internal marks omitted), adopted at 1336; see also Glover v. Liggett Grp., Inc., 459 F.3d 1304, 1308 (11th Cir. 2006) (per curiam) (citation omitted); Marshall Cnty. Bd. of Educ. v. Marshall Cnty. Gas Dist., 992 F.2d 1171, 1174 (11th Cir. 1993) (citations omitted). Finally, although *pro se* pleadings are governed by less stringent standards than pleadings prepared by attorneys, see Haines v. Kerner, 404 U.S. 519, 520 (1972); Tannenbaum v. United States, 148 F.3d 1262, 1263 (11th Cir. 1998) (per curiam), *pro se* parties are still required to comply with minimum pleading standards set forth in the Federal Rules of Civil

Procedure and this District's Local Rules, Grew v. Hopper, No. 2:07-cv-550-FtM-34SPC, 2008 WL 114915, at *2 (M.D. Fla. Jan. 9, 2008); see also Beckwith v. Bellsouth Telecomms., Inc., 146 F. App'x 368, 371 (11th Cir. 2005) (per curiam) (unpublished) (citation omitted) (stating "[a]lthough we construe them liberally, *pro se* complaints also must comply with the procedural rules that govern pleadings"); Lindsay v. Bank of Am. Home Loans, CIVIL ACTION NO. 1:15-CV-2074-ELR-LTW, 2016 WL 4546654, at *4 (N.D. Ga. Feb. 1, 2016) (citation omitted).[7]

## III. DISCUSSION

Becerra moves to dismiss the amended complaint on several grounds. [Doc. 16]. Specifically, Becerra argues that plaintiff's acceptance of the damages payment satisfies her termination and retaliation claims; plaintiff failed to exhaust her administrative remedies for her failure to accommodate and illegal disclosure claims; plaintiff cannot prevail on her failure to accommodate claim because she does not allege that she requested an accommodation due to her disability; the Agency did

[7] Additionally, a "defendant can move to dismiss a complaint under Rule 12(b)(1) for lack of subject matter jurisdiction by either facial or factual attack," and "[a] facial attack on the complaint requires the court merely to look and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in [her] complaint are taken as true for the purposes of the motion." Lange v. Houston Cnty., 499 F. Supp. 3d 1258, 1266 (M.D. Ga. 2020) (citation and internal marks omitted). "A factual attack, however, challenges the existence of subject matter jurisdiction using material extrinsic from the pleadings, such as affidavits or testimony." Id. (citation and internal marks omitted).

not illegally disclose her medical condition; plaintiff's Fifth Amendment claim is preempted by the Rehabilitation Act; plaintiff has not established a waiver of sovereign immunity to support her due process claim; and any claim pursuant to the APA is barred by the statute of limitations. See [Doc. 16-1 at 8-24]. The Court will address Becerra's arguments and the merits of plaintiff's claims in turn.

**A. Exhaustion of Administrative Remedies**

Becerra contends that "[p]laintiff's new Rehabilitation Act claims in Counts II (Failure to Accommodate) and IV (Illegal Disclosure) [asserted in the amended complaint] should be dismissed because she failed to properly exhaust administrative remedies for them." [Doc. 16-1 at 12]. "Prior to filing a . . . Rehabilitation Act action, a federal employee must first exhaust [her] administrative remedies." Mensah v. Mnuchin, CASE NO. 20-22876-CIV-ALTONAGA/Torres, 2020 WL 6701926, at *7 (S.D. Fla. Nov. 13, 2020) (citations omitted); see also Fleck v. Sec'y of U.S. Dep't of Transp., 826 F. App'x 782, 784 (11th Cir. 2020) (per curiam) (unpublished) (citations omitted) (stating that the "Rehabilitation Act extends the protections of the Americans with Disabilities Act of 1990 [] to federal government employees," who have "a duty to exhaust [] procedural remedies concerning any allegedly discriminatory act before challenging the act in federal court"); Barge v. Saul, CIVIL ACTION NO. 21-00116-JB-MU, 2022 WL 16632996, at *3 (S.D. Ala. Mar. 8, 2022) (citation omitted). The "purpose of exhaustion is to give the [EEOC] the

information it needs to investigate and resolve the dispute between the employee and the employer." Mensah, 2020 WL 6701926, at *7 (internal marks omitted) (quoting Brown v. Snow, 440 F.3d 1259, 1263 (11th Cir. 2006), overruled on other grounds by Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006)); see also Keith v. DeKalb Cnty. Sch. Dist., CIVIL ACTION NO. 1:21-CV-2539-SEG-CMS, 2023 WL 9607155, at *4 (N.D. Ga. Mar. 26, 2023) (citation and internal marks omitted) ("The purpose behind the applicable EEOC exhaustion requirement is to give the EEOC the first opportunity to investigate the alleged discriminatory practices to permit it to perform its role in obtaining voluntary compliance and promoting conciliation efforts."). Plaintiff's amended "complaint is therefore limited by 'the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.'" Keith, 2023 WL 9607155, at *4 (quoting Gregory v. Ga. Dep't of Hum. Res., 355 F.3d 1277, 1280 (11th Cir. 2004) (per curiam)); see also Mensah, 2020 WL 6701926, at *7 (quoting Litman v. Sec'y, of the Navy, 703 F. App'x 766, 771 (11th Cir. 2017) (per curiam) (unpublished)). "While the [C]ourt will allow allegations not present in the EEOC complaint if they amplify, clarify, or more clearly focus the allegations in the EEOC complaint, allegations of new acts of discrimination are inappropriate." Hughes v. Wormuth, Case No. 1:21-cv-730-CLM, 2022 WL 18024800, at *3 (N.D. Ala. Dec. 30, 2022) (alteration and internal marks omitted) (quoting Gregory, 355 F.3d at 1279); see also Keith, 2023 WL 9607155, at *4 (citation

omitted); Barge, 2022 WL 16632996, at *3; Mensah, 2020 WL 6701926, at *7 (citation omitted). However, "when the new claim does not grow out of the EEOC complaint, that claim should be dismissed for lack of jurisdiction because the plaintiff failed to administratively exhaust it." Hughes, 2022 WL 18024800, at *4 (citation omitted).

Plaintiff asserts a failure to accommodate claim and an illegal disclosure claim pursuant to the Rehabilitation Act in Counts II and IV of the amended complaint, [Doc. 15 ¶¶ 199-211, 221-29], which Becerra contends are subject to dismissal because she failed to exhaust her administrative remedies, see [Doc. 16-1 at 12-14]. Specifically, Becerra asserts that in her EEOC complaint, "[p]laintiff did not claim that [the Agency] failed to accommodate her or that she requested" an accommodation, nor did she include a claim regarding illegal disclosure. [Id. at 14 (citation omitted)]. The Court agrees.

Although plaintiff argues that her failure to accommodate claim "is closely intertwined with her discriminatory termination claim and was thus sufficiently exhausted," since her failure to accommodate "claim is based on shared underlying facts and events as her discriminatory discharge claim and involves the same managers," [Doc. 22 at 17], it "is well-settled that a failure-to-accommodate claim must be separately exhausted in the EEOC process," Booth v. City of Roswell, CIVIL ACTION NO. 1:17-CV-02490-LMM-CMS, 2018 WL 10798041, at *4 (N.D. Ga. Feb. 22, 2018) (citing Anderson v. Embarq/Sprint, 379 F. App'x 924, 927 (11th Cir. 2010) (per

curiam) (unpublished)), adopted by 2018 WL 10798045, at *1 (N.D. Ga. Mar. 13, 2018), aff'd, 754 F. App'x 834 (11th Cir. 2018) (per curiam) (unpublished). Further, plaintiff's contention that "it is unlikely the Agency would have undertook a separate EEO investigation of the wrongful disclosure claim even had [she] formally exhausted it," [Doc. 22 at 21], does not negate plaintiff's "duty to exhaust [] procedural remedies concerning any allegedly discriminatory act before challenging the act in federal court," Fleck, 826 F. App'x at 784 (citation omitted).[8]

Here, "[n]o matter how leniently the Court reads the EEO[] [complaint], [] plaintiff alleged nothing related to [a failure to accommodate claim or an illegal disclosure claim.]" Kim v. PGA Tour, Case No. 3:23-cv-441-TJC-JBT, Case No. 3:23-cv-623-TJC-MCR, 2024 WL 280297, at *3 (M.D. Fla. Jan. 25, 2024) (alterations, citation, and internal marks omitted). Plaintiff's EEO complaint is centered around "two discriminatory and retaliatory adverse actions against [her] based on [her] disability

[8] Although plaintiff contends that her illegal disclosure claim "arose during the EEO processing of [her] primary discrimination claims and was thus exhausted," [Doc. 22 at 20 (emphasis omitted)], "[d]iscrete acts of discrimination that occur after an administrative filing must first be administratively reviewed before a plaintiff may obtain judicial review of those same acts," Hausburg v. McDonough, Case No: 8:20-cv-2300-JSS, 2023 WL 3847326, at *12 (M.D. Fla. June 6, 2023) (internal marks omitted) (quoting Basel v. Sec'y of Def., 507 F. App'x 873, 876 (11th Cir. 2013) (per curiam) (unpublished)), and plaintiff "points to no evidence that she took the required steps to correct the [A]gency [or the EEOC] and thus to prosecute her wrongful disclosure claim under the Rehabilitation Act" when "she had an opportunity to do so during the formal EEOC process," Martin v. Locke, 659 F. Supp. 2d 140, 151 (D.D.C. 2009).

status:" (1) her demotion from project manager position on September 11, 2014, and (2) her termination on November 6, 2014, [Doc. 16-2 at 17]; see also [id. at 18-19]. However, she "did not mention anywhere in [her EEO complaint] that [the Agency] failed to provide [her] with a requested accommodation [that would allow her to] perform the essential functions of [her] job," Booth, 2018 WL 10798041, at *4 (citation omitted),[9] and "[n]othing in the [EEO complaint] would have put the EEOC or [the Agency] on notice that [plaintiff] intended to assert a [failure to accommodate ] claim or a[n illegal disclosure] claim," Hobson v. Delta Airlines, CIVIL ACTION NO. 1:23-cv-2195-JPB-CMS, 2023 WL 9116590, at *5 (N.D. Ga. July 28, 2023); see also Palmer v. McDonald, Case No. 8:13-cv-01784-T-02JSS, 2019 WL 1490667, at *9 (M.D. Fla. Apr. 4, 2019) (citation and internal marks omitted) (stating that "one cannot expect a failure to accommodate claim to develop from an investigation into a claim that an employee was terminated because of a disability"), aff'd, 824 F. App'x 967 (11th Cir. 2020) (per curiam) (unpublished). Specifically, "[n]owhere in the [] EEO[] [complaint]—in which [p]laintiff included a [three]-page detailed [explanation of discrimination]—did [p]laintiff state that" the Agency refused to provide her with a reasonable accommodation that she requested, or that the Agency improperly

[9] While plaintiff's EEO complaint does mention that she "requested the ability to take leave . . . in order to receive care for seizures [she] had recently suffered," [Doc. 16-2 at 17], there is no indication in the record that the Agency refused this request, see [id. (referring to her return from medial leave for her epilepsy care)].

disclosed medical information. Suarez v. Costco Wholesale Corp., Case Number: 22-20242-CIV-MARTINEZ, 2023 WL 2536992, at *5 (S.D. Fla. Mar. 16, 2023) (citation omitted). "Moreover, the fact that [p]laintiff separates her [discriminatory termination] claim and [failure to accommodate and illegal disclosure] claim[s] [in the amended complaint] is further proof that she knew that [these] claims [] are materially different." Id.

"In short, the scope of the EEOC investigation would not reasonably be expected to encompass either her [failure to accommodate] claim or her [illegal disclosure] claim," Hobson, 2023 WL 9116590, at *5; see also Lussier v. Defendant Lifeworks Wellness Ctr., LLC, Case No: 8:21-cv-2386-CEH-TGW, 2022 WL 2440380, at *4 (M.D. Fla. July 5, 2022) (citation omitted) (stating "plaintiff failed to exhaust administrative remedies for its failure to accommodate claim, which involves a different legal analysis than a claim of discriminatory treatment under the ADA and is therefore too distinct to have reasonably grown out of the discrimination allegations in the EEOC investigation"), and "[b]y failing to raise these claims before the EEOC, [p]laintiff failed to exhaust [her] administrative remedies . . . prior to filing suit," Booth, 2018 WL 10798041, at *4; see also Hausburg, 2023 WL 3847326, at *12 (finding plaintiff had "not presented any evidence that [certain] allegations were raised during the EEOC proceedings and a review of the [investigating Veteran Affairs' office] notices [did] not demonstrate that the EEOC investigated these

allegations as part of its analysis of [p]laintiff's other claims"); Velez v. Neocis, Inc., Case No.: 20-cv-23161-GAYLES/OTAZO-REYES, 2021 WL 2012377, at *2 (S.D. Fla. May 20, 2021) (finding plaintiff's allegations "that [d]efendant failed to accommodate her and retaliated against her due to her anxiety. . . [were] not contained in her [EEOC c]harge"); King v. Gen. Servs. Admin. Region 4 Emps. Assoc., Inc., CIVIL ACTION FILE NO. 1:15-cv-2306-SCJ-JKL, 2016 WL 11500220, at *5 (N.D. Ga. May 16, 2016) (citation omitted) (finding plaintiff's EEOC charge "in no way refer[red] to any . . . failure on the [defendant's] part to accommodate a disability"), adopted by 2016 WL 11500219, at *1 (N.D. Ga. June 7, 2016); Martin, 659 F. Supp. 2d at 150-51 (finding plaintiff failed to allege "any facts showing that she exhausted her administrative remedies with respect to any wrongful disclosure claims," and although she argued "that she adequately exhausted her administrative remedies by providing notice of her wrongful disclosure claims on a number of occasions," she "did not prosecute this claim when she had an opportunity to do so during the formal EEOC process," and she pointed "to no evidence that she took the required steps to correct the agency and thus to prosecute her wrongful disclosure claim under the Rehabilitation Act"). Accordingly, it is **RECOMMENDED** that Becerra's motion to dismiss, [Doc. 16], plaintiff's failure to accommodate claim asserted in Count II and her illegal disclosure claim asserted in Count IV be **GRANTED**.

**B. Acceptance of Benefits Doctrine**

Becerra contends that plaintiff's acceptance of the damages payment awarded by the EEOC satisfies her termination and retaliation claims asserted in Counts I and III of the amended complaint against the Agency based on the acceptance of benefits doctrine. [Doc. 16-1 at 8-12]. Specifically, Becerra asserts that "[t]here is no allegation that [p]laintiff took any steps to reserve any rights when she accepted the funds into her account[,]" and plaintiff "now seeks to re-litigate fully the merits of that decision as well as the damages awarded," but plaintiff should not be allowed "to enjoy the benefits of the administrative EEO process while challenging all the findings *de novo* in District Court," and the "federal common law's acceptance of the benefits doctrine supports a finding in [his] favor." [Id. at 9-11 (citations and internal marks omitted)]. Becerra contends that "[b]ecause [the Agency] has satisfied [p]laintiff's termination and retaliation claims by virtue of [the Agency's] payment of $75,000 to [p]laintiff as ordered by the [ ALJ] and increased by the [] OFO, it would be manifestly unjust for [the Agency] to continue to be exposed to litigation in this matter[,]" and the Agency's "payment was rendered in full satisfaction of a valid EEOC order that should not be undone or ignored." [Id. at 11-12 (citation omitted)]. Becerra "urges that this Court find consistently with the [Gaines v. Potter, Case No. 1:03-cv-03113-TWT, at [Doc. 44] (N.D. Ga. Dec. 22, 2004), adopted by [Doc. 49] (N.D. Ga. Mar. 1, 2005)] and [Troupe v. Snow, CIVIL ACTION NO. 1:03-CV-1351-RLV, 2005 WL

8154305 (N.D. Ga. July 20, 2005)] decisions, whose findings with regards to the acceptance of benefits doctrine are more on par with the Eleventh Circuit's decision in [Wynfield Inns v. Edward LeRoux Grp., Inc., 896 F.2d 483 (11th Cir. 1990)]." [Id. at 12].[10]

Plaintiff, relying on her response to Becerra's first motion to dismiss, see [Doc. 22 at 5], asserts that the Agency's "payments to [her] pursuant to EEOC administrative decisions neither resolved the discriminatory termination and retaliation claims in the instant [c]omplaint, nor do they preclude this [C]ourt's jurisdiction over such[,]" [Doc. 14 at 3]. Specifically, she asserts that the Rehabilitation Act and EEOC "regulations clearly provide that plaintiffs may bring their [EEO] . . . complaints to federal court upon exhausting administrative remedies," and § 501 "does not require, or even imply, plaintiffs must 'reserve their rights' upon receiving awards ordered by the EEOC as a prerequisite to bring EEO complaints to federal court for de novo review." [Id. at 6]. Plaintiff contends that applying the common law acceptance of benefits doctrine "to preclude de novo review of EEO complaints, specifically where plaintiffs exhausted their remedies but in so doing received (some) relief, would contravene the governing statutory and

[10] Becerra asserts that "if the Court determines that [p]laintiff may proceed *de novo*, [the Agency] contends that it is entitled, at a minimum[,] to a return of the money previously paid to [p]laintiff in the administrative EEO process." [Doc. 16-1 at 12 n. 8 (citation omitted)].

regulatory scheme of the EEOC." [Id.]. She argues that common law estoppel principles and the intentions of the parties "preclude the [Agency] from challenging this [C]ourt's subject matter jurisdiction over [her] claims exhausted in the EEOC process," because the Agency "never appealed, rejected[,] or contested the EEOC decisions awarding relief," and plaintiff "consistently made it very clear to the Agency. . . that she would not consider her EEO [c]omplaint resolved until she received what she considered 'make-whole' equitable relief." [Id. at 7].

In his reply brief, Becerra contends that "[c]ontrary to [p]laintiff's arguments, [he] never disputed this Court's jurisdiction over [her] termination and retaliation claims in Counts I and III[;] [r]ather, [his] sole argument regarding Counts I and III is that [p]laintiff should be equitably barred from pursuing claims for which she has already accepted payment for the EEO judgment under the acceptance of benefits doctrine." [Doc. 24 at 1-2 (citations omitted)]. He asserts that plaintiff "relies on three nonbinding decisions from this Court and other Circuits to assert that she is not required to return, or even offer to return, the electronic payments or reserve her rights," but "in order to overcome the equitable bar in this Circuit, [she] must show an objective manifestation of intent by the parties to allow for the appeal of the EEOC's decision despite [her] acceptance of payment," and because she "accepted payments of the EEOC award without reserving any rights, or returning the administrative award, and [the Agency] has not shown any such intent," her

"acceptance served to satisfy her termination and retaliation claims in Counts I and III" and she is "thus precluded from relitigating those claims here." [Id. at 2].

Because plaintiff "is a federal employee who brought this suit after a full adjudication before the EEOC, the scope of permissible review in this Court is limited." Smith-Jackson v. Elaine Chao, CIVIL ACTION FILE NO. 1:15-cv-1688-WSD-JKL, 2017 WL 4546125, at *5 (N.D. Ga. July 5, 2017), adopted by 2017 WL 3575003, at *11 (N.D. Ga. Aug. 18, 2017). "On conclusion of the administrative process, a federal employee who prevails may sue in a federal district court to enforce an administrative decision with which an agency has failed to comply." Ellis v. England, 43 F.3d 1321, 1324 (11th Cir. 2005) (per curiam) (citations omitted); see also Smith-Jackson, 2017 WL 4546125, at *5 (citations omitted). "Alternatively, a federal employee unhappy with the administrative decision may bring a claim in the federal district court and obtain the same *de novo* review that a private sector employee receives in a Title VII action pursuant to 42 U.S.C. § 2000e–16(c)." Ellis, 43 F.3d at 1324 (citing Chandler v. Roudebush, 425 U.S. 840, 863 (1976)); see also Smith-Jackson, 2017 WL 4546125, at *5 (citations omitted). "One consequence of the review of the administrative ruling being *de novo* is that this Court may not defer to any part of the administrative adjudication." Smith-Jackson, 2017 WL 4546125, at *5 (citations omitted). "As a result, if a plaintiff seeks review of any part of the case, she may not seek review of any less than the entirety of the case." Id.; see also Massinghill v.

Nicholson, 496 F.3d 382, 384 (5th Cir. 2007) (concluding that a plaintiff cannot seek partial *de novo* review of a final administrative disposition).

Becerra does not appear to contest that plaintiff is entitled to seek *de novo* review of the EEOC's final decision; instead, Becerra contends that plaintiff should be equitably barred from bringing her wrongful termination and retaliation claims because she has already accepted payment for them. See [Doc. 24 at 3-4]. "The Eleventh Circuit has explained that it is 'well settled that when a litigant accepts the substantial benefits of a judgment, voluntarily and intentionally, and with knowledge of the facts, [s]he waives the right to appeal from an otherwise adverse judgment.'" Smith-Jackson, 2017 WL 4546125, at *4 (quoting Fidelcor Mortg. Corp. v. Ins. Co. of N. Am., 820 F.2d 367, 370 (11th Cir. 1987)). However, where "a judgment is appealed on the ground that the damages awarded are inadequate, acceptance of payment of the amount of the unsatisfactory judgment does not, standing alone, amount to an accord and satisfaction of the entire claim." Palmer Ranch Holdings Ltd. v. C.I.R., 812 F.3d 982, 996 (11th Cir. 2016) (citation and internal marks omitted). The acceptance of benefits doctrine "is a kind of equitable estoppel," and "the parties' objective manifestations of intent should determine whether an appeal can go forward despite a party's acceptance of the payment on a judgment." Smith-Jackson, 2017 WL 4546125, at *4-5 (citing Palmer Ranch, 812 F.3d at 994-95). "Although it does not appear that the Court of Appeals for the Eleventh Circuit has

applied the 'acceptance of benefits' doctrine to a case involving the re-litigation of an administrative claim, this [C]ourt has no reason to believe that the doctrine would not be equally applicable in such a situation." Troupe, 2005 WL 8154305, at *4; see also Smith-Jackson, 2017 WL 4546125, at *4-6 (applying the acceptance of benefits doctrine after administrative proceedings resulted in a monetary award).

The parties each cite to various cases inside and outside of this district, but the majority of these cases were decided on summary judgment motions after the benefit of discovery, see Massinghill, 496 F.3d at 384; Smith-Jackson, 2017 WL 3575003, at *1; Smith-Jackson, 2017 WL 4546125, at *4; Troupe, 2005 WL 8154305, at *1; Legard v. England, 240 F. Supp. 2d 538, 542-43 (E.D. Va. 2002); see also [Doc. 16-6], and certain cases did not address the acceptance of benefits doctrine at all, see Farrar v. Nelson, 2 F.4th 986 (D.C. Cir. 2021); Ellis, 43 F.3d at 1325 (rejecting the plaintiff's argument that he was entitled to a *de novo* review limited to the question of damages without addressing the acceptance of benefits doctrine because the EEOC did not award him damages). However, accepting plaintiff's allegations in her amended complaint as true and construing the amended complaint in her favor, it does not appear that there is an "equitable bar to this suit going forward" at this stage of the proceedings. Smith-Jackson, 2017 WL 4546125, at *6.

Plaintiff alleges that the Agency "did not appeal or contest any of the [ALJ's] or EEOC's decisions throughout the administrative processing of [her] [c]omplaint,"

nor did the Agency contest the EEOC's or ALJ's findings "that the Agency discriminated against [ her] on the basis of her disability[,]" [Doc. 15 ¶ 41], and the record does not reflect that plaintiff "took any affirmative action in 'accepting' the judgment below," Smith-Jackson, 2017 WL 4546125, at *6, as plaintiff alleges that after the EEOC "denied most equitable relief and compensatory damages[,]" she continued to administratively appeal the ALJ's decision regarding damages, including by requesting reconsideration multiple times, see [Doc. 15 ¶¶ 47-50, 52-53], and it was not until plaintiff was informed that she "had no further right of administrative [a]ppeal or [r]econsideration" that she brought "her [c]omplaint to federal court to seek further relief," [id. ¶ 53]. Considering "the parties' objective manifestations of intent," Smith-Jackson, 2017 WL 4546125, at *5 (citation omitted), plaintiff's allegations, and the administrative processing of her complaint, it appears that this case should be allowed to proceed, because although plaintiff "has retained the money paid and has not returned it, [she] has otherwise not taken any action to accept the money paid," id., at *6, and instead, continues to challenge the damages awarded to her as insufficient. As the court explained in Massingill, "[t]his is not a situation involving the common-law defense of satisfaction of a . . . judgment from some time ago, it is [a] situation where the administrative scheme has played out, [] plaintiff ha[d] ninety days to sue, and she [did] so within that time." Massingill, 496 F.3d at 386. "In short, given the circumstances of this case, [plaintiff's] retention of

the money paid during the administrative proceedings will not bar her from continuing, at this point, from obtaining *de novo* review of her claims." Smith-Jackson, 2017 WL 4546125, at *7. Accordingly, it is **RECOMMENDED** that Becerra's motion to dismiss plaintiff's amended complaint, [Doc. 16], as to plaintiff's wrongful termination and retaliation claims be **DENIED**.[11]

**C. Count V of the Amended Complaint**

In Count V of the amended complaint, plaintiff asserts claims for "deprivation of due process in violation of the Fifth Amendment of the U.S. Constitution and § 702 of the [APA]." [Doc. 15 ¶¶ 230-45 (emphasis and caps omitted)]. Becerra argues that plaintiff's "Fifth Amendment claim in Count V [of the amended complaint] is subject to dismissal because the Rehabilitation Act preempts this claim." [Doc. 16-1 at 24]. Becerra also contends that "[a]bsent a valid waiver of sovereign immunity, federal agencies are immune from [lawsuits] for Fifth Amendment violations and [p]laintiff has not alleged any such waiver." [Id.]. Further, Becerra asserts that "to the extent [plaintiff] has alleged breach of contract allegations or APA claims under Count V,

[11] However, as the court pointed out in Smith-Jackson, plaintiff's "retention of the money that was part of the administrative relief is inconsistent with her lawsuit in federal court," and "[t]he money retained. . . should offset any judgment that [plaintiff] obtains in this Court." Smith-Jackson, 2017 WL 4546125, at *7. "[S]hould [plaintiff] be awarded nothing or less than the amount already received, the difference likely should be returned." Id. (footnote omitted).

those claims are barred by the applicable statute of limitations." [Id. (citations omitted)].

In her response, plaintiff argues that "[b]ecause [her] due process claim is not a discrimination claim, and is based entirely on the manner in which [she] was terminated without any notice or opportunity to be heard—irrespective of whether [her] termination from the Agency was discriminatory—the claim is distinct from her discrimination claims," and it "is thus not preempted by the [Rehabilitation] Act or Title VII." [Doc. 22 at 22]. Plaintiff also asserts that § 702 of the APA "waives sovereign immunity for claims seeking non-monetary remedies," and "[t]o the extent a statute of limitation may apply to [her] Fifth Amendment due process claim, it is not jurisdictional" and "subject to tolling." [Id. at 27-28 (emphasis and citation omitted)].

In his reply, Becerra contends that the Rehabilitation Act preempts plaintiff's Fifth Amendment claim because it covers the same injury, and although plaintiff mentions the APA in the heading of Count V, she states no APA allegations. [Doc. 24 at 25-26 (citation omitted)]. Further, Becerra asserts that any breach of contract claims regarding her termination "has a six year statute of limitations that expired in 2020." [Id. at 26 (citation omitted)]. Becerra contends that plaintiff "has had 8 years

of EEO due process, and her attempt to circumvent the Rehabilitation Act with artful pleading should be soundly rejected" and Count V dismissed. [Id.].[12]

Becerra contends that plaintiff's Fifth Amendment claim is due to be dismissed because she has not alleged a waiver of sovereign immunity. See [Doc. 16-1 at 24]. The "Fifth Amendment to the United States Constitution prohibits the deprivation of property without due process of law." Mobley v. Dep't of Child. & Fams. Access Fla., No. 3:23-cv-519-TJC-PDB, 2023 WL 7481593, at *5 (M.D. Fla. Aug. 16, 2023), adopted sub. nom. Mobley v. Harris, Case No. 3:23-cv-519-TJC-PDB, 2023 WL 6439574, at *2 (M.D. Fla. Oct. 3, 2023); see also U.S. Const. Amend. V. Plaintiff asserts

[12] Because plaintiff has not responded to Becerra's argument in his motion to dismiss that any alleged breach of contract claims or APA claims are barred by the statute of limitations, her "[f]ailure to respond to an opposing party's argument constitutes abandonment of [those claims] and warrants [their] dismissal." Demmons v. Fulton Cnty., Civil Action File No. 1:09-CV-2312-TWT-WEJ, 2010 WL 3418325, at *11 (N.D. Ga. Aug. 2, 2010) (citations omitted), adopted by 2010 WL 3418328, at *1 (N.D. Ga. Aug. 25, 2010); see also Genterra Grp., LLC v. Sanitas USA, Inc., Civil Action No. 20-22402-Civ-Scola, 2021 WL 148887, at *7 (N.D. Ga. Jan. 15, 2021) (citation omitted) ("Failing to respond to an argument in a motion to dismiss is equal to conceding that argument."); Williams v. Greenpoint Mortg. Funding, Inc., CIVIL ACTION NO. 1:15-CV-4487-SCJ-LTW, 2017 WL 8221400, at *3 (N.D. Ga. Jan. 30, 2017) (citations omitted) (stating that by not responding to defendant's argument that he failed to state a breach of contract claim, plaintiff had abandoned his claim, and "[w]hen an argument is raised upon a motion to dismiss that a claim is subject to dismissal, and the non-moving party fails to respond to such an argument, such claims are deemed abandoned and subject to dismissal"), adopted by 2017 WL 8222339, at *1 (N.D. Ga. Feb. 21, 2017). Further, because plaintiff's APA claims are subject to dismissal, the Court need not address plaintiff's argument that the APA waives sovereign immunity for claims seeking non-monetary remedies. See [Doc. 22 at 27-28].

a Fifth Amendment due process claim against Becerra in his official capacity. [Doc. 15 ¶¶ 230-45]. However, "[a]s a general rule, sovereign immunity shields the United States and its agencies from suit," Craddock v. Becerra, CIVIL ACTION NO. 1:22-CV-01443-JPB, 2023 WL 1099755, at *3 (N.D. Ga. Jan. 27, 2023) (citing Ishler v. Internal Revenue, 237 F. App'x 394, 397 (11th Cir. 2007) (per curiam) (unpublished)); see also Sharma v. Drug Enf't Agency, 511 F. App'x 898, 901 (11th Cir. 2013) (per curiam) (unpublished) (citation and internal marks omitted) (stating that "[a]bsent a waiver, sovereign immunity shields the [f]ederal [g]overnment and its agencies from suit"), and that protection "generally extends to the employees of those agencies sued in their official capacities," Lebed v. U.S. Postal Inspector Serv., Case No. 5:23-cv-414-KKM-PRL, 2023 WL 6123515, at *2 (M.D. Fla. Sept. 19, 2023) (internal marks omitted) (quoting Ishler, 237 F. App'x at 397); see also Craddock, 2023 WL 1099755, at *3 (citation omitted). While the "court recognizes that the United States may waive sovereign immunity," the "waiver must be 'unequivocally expressed' to be effective." Craddock, 2023 WL 1099755, at *3 (quoting King v. U.S. Gov't, 878 F.3d 1265, 1267 (11th Cir. 2018)); see also Sheppard v. Robins Air Force Base, CIVIL ACTION NO. 5:23-CV-336 (MTT), 2024 WL 382442, at *2 (M.D. Ga. Jan. 31, 2024) (quoting United States v. Mitchell, 463 U.S. 206, 212 (1983) ("'It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction[.]'").

"Reviewing the allegations [of her due process claim] in [p]laintiff's [amended c]omplaint, [she] has failed to show that the United States has consented to its officials being sued in their official capacities." Craddock, 2023 WL 1099755, at *3 (footnote omitted); see also Moore v. United States, Case No: 6:21-cv-395-CEM-DCI, 2023 WL 2126108, at *6 (M.D. Fla. Jan. 3, 2023) (citation omitted) ("Due process claims. . . based directly on Fifth Amendment violations are barred by the doctrine of sovereign immunity."), adopted by 2023 WL 2039420, at *3 (M.D. Fla. Jan. 31, 2023), aff'd, 2024 WL 1759142 (11th Cir. 2024) (per curiam). "In other words, [p]laintiff does not identify a valid waiver of sovereign immunity for [her] claims," and she, "therefore, cannot sue [Becerra]—[a] federal officer[] in [his] official capacit[y]—for . . . alleged constitutional violations." Craddock, 2023 WL 1099755, at *3 (citation omitted); see also Kight v. U.S. Dist. Ct., N. Dist. of Ga., 681 F. App'x 882, 883-84 (11th Cir. 2017) (per curiam) (unpublished) (citations omitted) (finding the plaintiff "failed to identify a valid waiver of sovereign immunity for his claims," and his "contention that his claims [were] not barred because he [sought] declaratory and injunctive relief [was] incorrect," since he was still required to "establish a valid waiver of sovereign immunity before his claims seeking these types of relief from the federal government [could] go forward"); Moore, 2023 WL 2126108, at *6 (citation omitted) (finding plaintiff's due process constitutional claim against the United States was due to be dismissed and stating that "[r]egardless of the relief, [p]laintiff must establish that

sovereign immunity has [been] waived"). Accordingly, it is **RECOMMENDED** that Becerra's motion to dismiss plaintiff's amended complaint, [Doc. 16], as to plaintiff's Fifth Amendment claim and APA claims be **GRANTED.**[13]

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[13] The parties also dispute whether Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII"), and thus the Rehabilitation Act, preempts plaintiff's Fifth Amendment claim, see [Doc. 16-1 at 24; Doc. 22 at 22-27; Doc. 24 at 25-26]; see also Burgos v. Chertoff, 274 F. App'x 839, 842 (11th Cir. 2008) (per curiam) (unpublished) (citations omitted) ("The remedies, procedures, and rights of Title VII are available to [plaintiffs] filing complaints under the [Rehabilitation] Act"), but the Court need not reach this issue since plaintiff's claim is due to be dismissed based on sovereign immunity. However, absent a finding of sovereign immunity, plaintiff's Fifth Amendment due process claim would not be preempted by Title VII or the Rehabilitation Act. The Rehabilitation Act "provides the exclusive remedy for federal government employees seeking damages and relief for work-place discrimination based on disability," Terry v. Wilkie, Case No.: 8:18-cv-2664-T-33AAS, 2019 WL 6219944, at *5 (M.D. Fla. Nov. 21, 2019) (citations and internal marks omitted); see also Bend v. Scalia, CIVIL ACTION NO. 1:19-CV-4295-JPB-JSA, 2020 WL 13543925, at *3 (N.D. Ga. Feb. 11, 2020) (citations omitted) (stating that "the exclusive remedy for federal employees alleging that federal agencies engaged in disability discrimination is the Rehabilitation Act"), adopted by 2020 WL 13543878, at *2 (N.D. Ga. Apr. 14, 2020), and "[i]n considering plaintiff's constitutional claims, the pertinent inquiry is whether [she] is seeking to redress the violation of rights guaranteed by the Rehabilitation Act," Paegle v. Dep't of Interior, 813 F. Supp. 61, 67 (D.D.C. 1993) (alterations, citation, and internal marks omitted); see also Holbrook v. City of Alpharetta, 112 F.3d 1522, 1530 (11th Cir. 1997). "In other words, plaintiff can only pursue [her] constitutional claims if the applicable statutes do not afford [her] a remedy for the violations [s]he is seeking to redress." Paegle, 813 F. Supp. at 67 (citation and internal marks omitted). Plaintiff relies on International Union, United Government Security Officers of America v. Clark, 704 F. Supp. 2d 54 (D.D.C. 2010), to support her argument that her due process claim is not preempted by the Rehabilitation Act. [Doc. 22 at 22-26]. "[R]esolution of the preemption issue turns on a careful examination of the claims," Int'l Union, 704 F. Supp. 2d at 62, and as the court in International Union stated, Becerra's argument that plaintiff's "due process claim is based on the same underlying facts in connection with her Rehabilitation Act claims," [Doc. 24 at 25], "sweeps too broadly," because

## IV. CONCLUSION

For the foregoing reasons, Becerra's motion for leave to file matters under seal, [Doc. 17], is **GRANTED**, and it is **RECOMMENDED** that Becerra's motion to dismiss the amended complaint, [Doc. 16], be **GRANTED IN PART** and **DENIED IN PART**, and that Becerra's motion to dismiss the original complaint, [Doc. 10], be **DENIED** as **MOOT**.

**IT IS SO ORDERED, RECOMMENDED,** and **DIRECTED** this 22nd day of July, 2024.

Russell G. Vineyard

RUSSELL G. VINEYARD
UNITED STATES MAGISTRATE JUDGE

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"[i]t is possible, as [McKenna v. Weinberger, 729 F.2d 783 (D.C. Cir. 1984),] demonstrates, to allege distinct injuries even though the end result for the employee is the loss of a job position," Int'l Union, 704 F. Supp. 2d at 62 (alteration and internal marks omitted). Plaintiff's Fifth Amendment due process claim appears to be distinct from her discrimination claims under the Rehabilitation Act as her due process claim focuses on the Agency's failure to abide by the termination process in her employment contract and "ORISE terms and conditions" and the assurances the Agency provided her regarding notice prior to termination, see [Doc. 15 ¶¶ 233-39], and plaintiff alleges that another ORISE Fellow was provided notice at least three weeks prior to termination, [id. ¶ 166]; see also [id. ¶ 168]. Although "the outcome for the plaintiff [is] the same under her [Rehabilitation Act] and [due process] claims: dismissal from her position," Int'l Union, 704 F. Supp. 2d at 62 (citation omitted), plaintiff's due process claim is distinct from her discrimination claims under the Rehabilitation Act because it deals with the actual termination process followed by the Agency rather than the alleged discriminatory decision to terminate her employment, see [Doc. 15 ¶¶ 231-45 (alleging that the Agency breached its contract with plaintiff regarding notice prior to termination despite assurances)].